

Amendment and Response to Office Action  
39569-2661D  
Stark, *et al*  
U.S.S.N. 10/699,297

#### Remarks

Reconsideration of the rejections set forth in the Office Action dated August 15, 2005, is respectfully requested. Applicant has canceled claims 4-9, 13 and 14 without prejudice. Claims 1, 2, 10, 11, and 12 have been amended by way of this amendment and response. Applicant has added new claims 15-20. The amendments and new claims are all supported in the specification. No new matter has been added by way of this amendment. Claims 1-3, 10-12 and 15-20 are pending in the present application.

#### Rejection Of Claims for Obviousness-Type Double Patenting

The Examiner rejected claims 1 and 2 as originally filed under the judicially created doctrine of obviousness-type double patenting, alleging that claims 1 and 2 are unpatentable over claims 43, 47 and 49 of U.S. Patent No. 6,820,979. The Examiner further rejected claims 1-14 under the judicially created doctrine of obviousness-type double patenting, alleging that claims 1-14 are unpatentable over claims 12 and 13 of U.S. Patent No. 6,116,736. To overcome the Examiner's rejection, Applicants file herewith a Terminal Disclaimer, disclaiming the terminal part of any patent granted on this application which would extend beyond the expiration date of any of U.S. Patent Nos. 6,116,736 or 6,820,979.. Also, Applicant notes that a filing of a terminal disclaimer to obviate a rejection based on non-statutory double patenting is not an admission of the propriety of the rejection. Quad Environmental Technologies Corp. v. Union Sanitary District, 946 F.2d 870 (Fed. Cir. 1991). The filing of a terminal disclaimer simply serves the statutory function of removing the rejection of double patenting, and raises neither a presumption nor

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estoppel on the merits of the rejection. Accordingly, Applicants respectfully request that the rejection for obviousness-type double patenting be withdrawn.

**Rejection of Claims 1, 7, and 9-14 Under 35 U.S.C. Section 102(e)**

The Examiner rejected claims 1, 7 and 9-14 for allegedly being anticipated under 35 U.S.C Section 102(e) by U.S. Patent No. 6,022,109. The Examiner argued that the light source described in the '109 patent is amplitude modulated based on LEDs 36A and 36B such that, the control unit 11 will light LED 36A if the presence of drugs is detected, and LED 36B if drugs are not detected. Applicant has amended independent claim 1 to recite "an amplitude modulated light source in electrical communication with the pupilometer, said light source directed at the individual when the pupilometer is positioned to obtain data from the eye." The light sources 36A and 36B are not directed at the individual when the pupilometer is positioned to obtain data from the eye. That is because the light sources 36A and 36B are not used to stimulate the eye of the patient or individual being tested. They are merely indicator lights used by the tester to determine if certain conditions may be present in the patient. In contrast, the amplitude modulated light source recited in the present claims is directed at the individual when the pupilometer is positioned to obtain data from the eye. For at least that, claim 1 is patentably distinct from the '109 reference. Accordingly, Applicants respectfully request that the Examiner withdraw the rejection of claim 1 under 35 U.S.C. Section 102(e). Claims 2, 3, 10, 11, and 12 depend from claim 1 and are patentably distinct from the prior art for at least those reasons articulate with respect to claim 1.

**New Claims 15-20**

New independent claim 15 recites "an amplitude modulated light source in electrical communication with the pupilometer, the light source adapted for stimulating an eye over a continuous range of amplitudes." The Examiner has cited the '109 patent as a reference that discloses a pupilometer with an amplitude modulated light source. The Examiner has argued that the light source in the '109 patent is amplitude modulated based on LEDs 36A and 36B "such that, the control unit 11 will light LED 36A if the presence of drugs is detected, and LED 36B if drugs are not detected." If LEDs 36A and 36B are amplitude modulated, they operate at two distinct amplitudes: an amplitude or intensity of 0 lux when the LED is off, and

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an amplitude or intensity of X lux when the LED is on. In other words, there are two separate amplitudes, and they are not continuous over a range. Thus, the '109 reference does not teach an amplitude modulated light source that is adapted for stimulating an eye over a continuous range of amplitudes. Accordingly, claim 15 is patentably distinct from the prior art. Claims 16-20 depend from claim 15 and are patentably distinct from the '109 patent for at least the same reasons articulated with respect to claim 15.

Therefore, Applicants respectfully submit that all outstanding issues have been resolved, and claims 1-3, 10-12 and 15-20 are now in condition for allowance.

Prompt and favorable action on the merits of the claims is earnestly solicited. Please contact Applicants' undersigned representative if any minor issues remain.

Applicants herewith petitions for an extension of time for a total period of two months to respond to the Office Action mailed on August 15, 2005. Applicant submits a credit card payment form herewith and requests that the Commissioner charge the credit card number provided on the credit card payment form in the amount of \$225 for the petition fee.

Respectfully submitted,

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